

**REMARKS:**

Claims 2-4, 7-10, 12-14, 17-20, 22-24, and 27-34 are currently pending in the application. Claims 31-34 stand rejected under 35 U.S.C. § 112, second paragraph. Claims 2-4, 7, 8, 12-14, 17, 18, 22-24, 27, 28, and 31-34 stand rejected under 35 U.S.C. § 103(a) over U.S. Patent No. 6,226,618 to Downs et al. ("Downs") in view of U.S. Patent No. 6,343,738 to Ogilvie et al. ("Ogilvie") and in further view of U.S. Patent No. 6,230,288 to Kuo et al. ("Kuo"). Claims 9, 19, and 29 stand rejected under 35 U.S.C. § 103(a) over *Downs* in view of *Ogilvie* in view of *Kuo* and in further view of U.S. Patent No. 4,648,047 to Berkland et al. ("Berkland"). Claims 10, 20, 30 stand rejected under 35 U.S.C. § 103(a) over *Downs* in view of *Ogilvie* in view of *Kuo* and in further view of U.S. Patent No. 6,094,722 to Astola et al. ("Astola").

Although the Applicant believes claims 2-4, 7-10, 12-14, 17-20, 22-24, and 27-34 are directed to patentable subject matter, and in condition for allowance without amendment. The Applicant has amended independent claims 31-34 to expedite prosecution of this Application and to more particularly point out and distinctly claim the subject matter which the Applicant regards as the invention. By making these amendments, the Applicant makes no admission concerning the merits of the Examiner's rejection, and respectfully reserve the right to address any statement or averment of the Examiner not specifically addressed in this response. Particularly, the Applicant reserves the right to file additional claims in this Application or through a continuation patent application of substantially the same scope of originally filed claims 1-34. No new matter has been added.

**REJECTION UNDER 35 U.S.C. § 112:**

Claims 31-34 stand rejected under 35 U.S.C. § 112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The Applicant respectfully disagrees.

Nonetheless, the Applicant has amended independent claims 31-34 in an effort to expedite prosecution of this Application and to more particularly point out and distinctly claim the subject matter which the Applicant's regard as the invention. By making these amendments, the Applicant does not indicate agreement with or acquiescence to the Examiner's position with respect to the rejections of these claims under 35 U.S.C. § 112, as set forth in the Office Action.

The Applicant respectfully submits that amended independent claims 31-34 are considered to be in full compliance with the requirements of 35 U.S.C. § 112. The Applicant further submits that amended independent claims 31-34 are in condition for allowance. Thus, the Applicant respectfully requests that the rejection of claims 31-34 under 35 U.S.C. § 112 be reconsidered and that claims 31-34 be allowed.

**REJECTION UNDER 35 U.S.C. § 103(a):**

Claims 2-4, 7, 8, 12-14, 17, 18, 22-24, 27, 28, and 31-34 stand rejected under 35 U.S.C. § 103(a) over *Downs* in view of *Ogilvie* and in further view of *Kuo*. Claims 9, 19, and 29 stand rejected under 35 U.S.C. § 103(a) over *Downs* in view *Ogilvie* in view of *Kuo* and in further view of *Berkland*. Claims 10, 20, 30 stand rejected under 35 U.S.C. § 103(a) over *Downs* in view of *Ogilvie* in view of *Kuo* and in further view of *Astola*.

Although the Applicant believes claims 2-4, 7-10, 12-14, 17-20, 22-24, and 27-34 are directed to patentable subject matter without amendment, the Applicant has amended independent claims 31-34 to expedite prosecution of this Application and to more particularly point out and distinctly claim the subject matter which the Applicant regards as the invention. By making these amendments, the Applicant does not indicate agreement with or acquiescence to the Examiner's position with respect to the rejections of these claims under 35 U.S.C. § 103(a), as set forth in the Office Action.

The Applicant respectfully submits that *Downs*, *Ogilvie*, or *Kuo*, either individually or in combination, fails to disclose, teach, or suggest each and every element of claims 2-4, 7, 8, 12-14, 17, 18, 22-24, 27, 28, and 31-34. The Applicant further submits that *Downs*,

*Ogilvie, Kuo, or Berkland*, either individually or in combination, fails to disclose, teach, or suggest each and every element of claims 9, 19, and 29. The Applicant still further submits that *Downs, Ogilvie, Kuo, or Astola*, either individually or in combination, fails to disclose, teach, or suggest each and every element of claims 10, 20, and 30. Thus, the Applicant respectfully traverses the Examiner's obvious rejection of claims 2-4, 7-10, 12-14, 17-20, 22-24, and 27-34 under 35 U.S.C. § 103(a) over the proposed combination of *Downs, Ogilvie, Kuo, Berkland, and Astola*, either individually or in combination.

**The Proposed *Downs-Ogilvie-Kuo* Combination Fails to Disclose, Teach, or Suggest Various Limitations Recited in Applicant's Independent Claims 2-4, 7, 8, 12-14, 17, 18, 22-24, 27, 28, and 31-34**

For example, with respect to amended independent claim 32, this claim recites:

*An electronic commerce system for watermarking data associated with one or more products*, the system comprising:

*a global content directory server for generating an algorithm for creating a particular watermark pattern in data*, the *data associated with one or more products available from one or more sellers*, the data comprising one or more product attribute values, seller attribute values, and product descriptions for each of the one or more products, the data being stored in one or more databases accessible to one or more buyer computers for search queries for data associated with certain of the products, *the generated algorithm comprises a sifting function for creating the particular watermark pattern in the data* for identifying the data and the source of the data, without adversely affecting the use of the data, *the sifting function alters printable American Standard Code for Information Interchange (ASCII) characters in the data*, wherein the particular watermark pattern comprises a plurality of non-printable characters *inserted throughout the data according to a pre-defined arrangement*, and the particular watermark pattern facilitates identification of a copy of the data and *does not affect authorized use of the data by the one or more buyer computers*; and

*in response to generating the algorithm for creating the particular watermark pattern in the data, applying the sifting function to the data to create the particular watermark pattern in the data.* (Emphasis Added).

Amended independent claims 31, 33, and 34 recite similar limitations. *Downs*, *Ogilvie*, or *Kuo* either individually or in combination, fail to disclose, teach, or suggest each and every element of amended independent claims 31-34.

The Applicant respectfully submits that *Downs* has nothing to do with amended independent claim 32 limitations regarding an "**electronic commerce system for watermarking data associated with one or more products**" and in particular, *Downs* has nothing to do with amended independent claim 32 limitations regarding "**a global content directory server for generating an algorithm for creating a particular watermark pattern in data, the data associated with one or more products available from one or more sellers**", the data comprising one or more product attribute values, seller attribute values, and product descriptions for each of the one or more products, the data being stored in one or more databases accessible to one or more buyer computers for search queries for data associated with certain of the products". In particular, the Examiner equates "a particular [watermark] pattern" recited in amended independent claims 32 with the process for packing content and metadata disclosed in *Downs*. (22 March 2006 Office Action, Page 4). However, the process for packing content and metadata disclosed in *Downs* is performed **on data related to the content, but does not include the content itself**. (Column 9, Lines 15-32). In contrast, the algorithm recited in amended independent claim 32 is a "**global content directory server**" for "**generating an algorithm for creating a particular watermark pattern in data, the data associated with one or more products available from one or more sellers**" and is **applied to the data** and "**the data [is] associated with one or more products available from one or more sellers**". Thus, the Applicant respectfully submits that the equations forming the foundation of the Examiner's comparison between *Downs* and amended independent claim 32 cannot be made. The Applicant further respectfully submits that these distinctions alone are sufficient to patentably distinguish amended independent claim 32 from *Downs*.

The Applicant further respectfully submits that in response to Applicant's arguments in the previous Office Action response mailed on 29 December 2005, the Examiner asserts that the "phrase 'associated with' does not necessarily mean

'include'." (22 March 2006 Office Action, Page 4). The Applicant does not understand the context of the Examiner's assertion. The Applicant respectfully submits, as described above, that the Examiner's equation of "a particular [watermark] pattern" recited in amended independent claim 32 with the process for packing content and metadata disclosed in *Downs* cannot be made. In particular, the Applicant directs the Examiner's attention to the Examiner's cited text in *Downs*:

The term metadata is used throughout this document to mean data **related to the Content 113** and in this embodiment **does not include the Content 113 itself**. (Column 9, Lines 21-24). (Emphasis Added).

Thus, according to the above cited text in *Downs*, the process for packing content and metadata disclosed in *Downs* is performed **on data related to the content, but does not include the content itself**. (Column 9, Lines 15-32). In contrast, amended independent claim 32 provides "**an algorithm for creating a particular watermark pattern in data**" wherein the particular watermark pattern is created in the data and the "**data [is] associated with one or more products available from one or more sellers**". Thus, *Downs* cannot provide for a "**global content directory server for generating an algorithm for creating a particular watermark pattern in data**, the **data associated with one or more products available from one or more sellers**, the data comprising one or more product attribute values, seller attribute values, and product descriptions for each of the one or more products, the data being stored in one or more databases accessible to one or more buyer computers for search queries for data associated with certain of the products," since *Downs* does not even provide for the process for packing content and metadata on the content of the data itself.

The Applicant respectfully submits that the Office Action acknowledges, and Applicant agrees, that *Downs* fails to disclose the emphasized limitations in amended independent claim 31. Specifically the Examiner acknowledges that *Downs* fails to teach "**the algorithm is a sifting function**" or "**the pattern including inserting non-printable ASCII characters throughout the data according to pre-defined arrangement**." (22 March 2006 Office Action, Page 5). However, the Examiner asserts that the cited portions of *Ogilvie* and *Kuo* disclose the acknowledged shortcomings in

Downs. The Applicant respectfully traverses the Examiner's assertions regarding the subject matter disclosed in *Ogilvie* and *Kuo*.

The Applicant further respectfully submits that *Ogilvie* has nothing to do with amended independent claim 32 limitations regarding the "**generated algorithm comprises a sifting function for creating the particular watermark pattern in the data**" for identifying the data and the source of the data, without adversely affecting the use of the data, **the sifting function alters printable American Standard Code for Information Interchange (ASCII) characters in the data**, wherein the particular watermark pattern comprises a plurality of non-printable characters **inserted throughout the data according to a pre-defined arrangement**, and the particular watermark pattern facilitates identification of a copy of the data and **does not affect authorized use of the data by the one or more buyer computers**". Rather *Ogilvie* merely discloses a "**sampling technique**" based on content types which may include ASCII text. (Column 20, Lines 8-23). The "**sampling technique**" in *Ogilvie*, merely categorizes **content type** and has nothing to do with inserting a plurality of non-printable ASCII characters according to a pre-defined arrangement, or any type of arrangement at all. (Column 20, Lines 8-23). Thus *Ogilvie* cannot provide a "**generated algorithm comprises a sifting function for creating the particular watermark pattern in the data**" for identifying the data and the source of the data, without adversely affecting the use of the data, **the sifting function alters printable American Standard Code for Information Interchange (ASCII) characters in the data**, wherein the particular watermark pattern comprises a plurality of non-printable characters **inserted throughout the data according to a pre-defined arrangement**, and the particular watermark pattern facilitates identification of a copy of the data and **does not affect authorized use of the data by the one or more buyer computers**," since *Ogilvie* does not even provide a sifting function or a pre-defined arrangement for **inserting non-printable ASCII characters** in the first place.

In addition, the Examiner equates the "**sifting function**" recited in amended independent claim 32 with the "**sampling technique**" disclosed in *Ogilvie*. (22 March 2006 Office Action, Page 5). However, the "**sampling technique**" disclosed in *Ogilvie*

merely samples by deleting every Nth (with N=3, 4, or 5) characters. (Column 20, Lines 8-23). In contrast, the algorithm recited in amended independent claim 32 is generated for “*alter[ing] printable American Standard Code for Information Interchange (ASCII) characters in the data*” wherein the non-printable characters are “*inserted throughout the data according to a pre-defined arrangement*”. The Applicant respectfully requests clarification as to how the Examiner is equating deleting every Nth character disclosed in *Ogilvie* with *altering* and *inserting non-printable characters throughout the data according to a pre-defined arrangement*, as recited in amended independent claim 32. Thus, the Applicant respectfully submits that the equations forming the foundation of the Examiner’s comparison between *Ogilvie* and amended independent claim 32 cannot be made. The Applicant further respectfully submits that these distinctions alone are sufficient to patentably distinguish amended independent claim 32 from *Ogilvie*.

The Applicant still further respectfully submits that *Kuo* has nothing to do with amended independent claim 32 limitations regarding “*the sifting function alters printable American Standard Code for Information Interchange (ASCII) characters in the data*”, wherein the particular watermark pattern comprises a plurality of non-printable characters *inserted throughout the data according to a pre-defined arrangement*, and the particular watermark pattern facilitates identification of a copy of the data and *does not affect authorized use of the data by the one or more buyer computers*”. Rather *Kuo* discloses a method for detecting computer viruses that infect text-based files and transforms the “*myriad*” [i.e. *countless, innumerable, numberless, numerous, many, multitude, or heap*] of possible whitespace sequences with a common whitespace sequence. (Abstract and Column 5, Lines 5-38). Thus, *Kuo* cannot provide a “*sifting function [that] alters printable American Standard Code for Information Interchange (ASCII) characters in the data*”, wherein the particular watermark pattern comprises a plurality of non-printable characters *inserted throughout the data according to a pre-defined arrangement*, and the particular watermark pattern facilitates identification of a copy of the data and *does not affect authorized use of the data by the one or more buyer computers*,” since *Kuo* does not even provide a pre-defined, pre-determined, or even an ability to calculate,

estimate, or even guess at a possible definitive arrangement of inserting non-printable ASCII characters throughout the data according to a pre-defined arrangement.

The Applicant respectfully submits that the Office Action has failed to properly establish a *prima facie* case of obviousness based on the proposed combination of *Downs*, *Ogilvie*, and *Kuo*, either individually or in combination. The Office Action has not shown the required teaching, suggestion, or motivation in these references or in knowledge generally available to those of ordinary skill in the art at the time of the invention to combine *Downs*, *Ogilvie*, and *Kuo* as proposed. The Office Action merely states that “it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow the algorithm [and the pattern] in *Downs*’ teaching to include a sifting function [and include inserting non-printable ASCII characters] as taught by *Ogilvie* and *Kuo*”. (22 March 2006 Office Action, Page 5). The Applicant respectfully disagrees.

The Applicant further submits that this purported advantage relied on by the Examiner is nowhere disclosed, taught, or suggested in *Downs*, *Ogilvie*, or *Kuo*, either individually or in combination. The Examiner appears to be asserting that one of ordinary skill in the art at the time the invention was made would have been motivated “**for better [sic] protecting the products from unauthorized access.**” (22 March 2006 Office Action, Page 5). The Applicant respectfully disagrees and further respectfully requests clarification as to how the Examiner arrives at this conclusion. For example, how does “include[ing] a sifting function [and including inserting non-printable ASCII characters] as taught by *Ogilvie* and *Kuo*” directly protect the “**products from unauthorized access**” and to what extent does the Examiner purport that “**protecting the products from unauthorized access**” applies to the subject Application. **The Applicant respectfully requests the Examiner to point to the portions of *Downs*, *Ogilvie*, or *Kuo* which contain the teaching, suggestion, or motivation to combine *Downs*, *Ogilvie*, or *Kuo* for the Examiner’s stated purported advantage.** In particular, the Applicant respectfully requests the Examiner to point to the portions of *Downs*, *Ogilvie*, or *Kuo* which expressly state that “include[ing] a sifting function [and including inserting non-printable ASCII characters] as taught by *Ogilvie* and *Kuo*” directly protect the “**products from**

*unauthorized access*" and that directly "*protecting the products from unauthorized access*" is related to *a global content directory server for generating an algorithm for creating a particular watermark pattern in data*, as recited in amended independent claim 32. The Applicant further submits that the Examiner is using the subject Application as a template to formulate reconstructive hindsight, which constitutes impermissible use of hindsight under 35 U.S.C. § 103(a).

A recent Federal Circuit case makes it crystal clear that, in an obviousness situation, the *prior art must disclose each and every element of the claimed invention*, and that *any motivation to combine or modify the prior art must be based upon a suggestion in the prior art*. *In re Lee*, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). (Emphasis Added). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *Id.* at 1434-35. With respect to the subject Application, *the Examiner has not adequately supported the selection and combination of Downs, Ogilvie, and Kuo to render obvious the Applicant's claimed invention*. The Examiner's conclusory statements that "it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow the algorithm [and the pattern] in *Downs*' teaching to include a sifting function [and include inserting non-printable ASCII characters] as taught by *Ogilvie* and *Kuo*" or that "**for better [sic] protecting the products from unauthorized access**", *does not adequately address the issue of motivation to combine*. (22 March 2006 Office Action, Page 5). This *factual question of motivation is material to patentability*, and *cannot be resolved on subjective belief* and unknown authority. *Id.* (Emphasis Added). It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to "[use] that which the inventor taught against its teacher." *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983). Thus, *the Office Action fails to provide proper motivation for combining the teachings of Downs, Ogilvie, or Kuo*, either individually or in combination.

**The Examiner's purported *Official-Notice* is improper under MPEP § 2144.03**

The Applicant respectfully submits that in response to Applicant's arguments and adequate traversal that the Examiner's Official Notice is improper, as set forth in the Amendment filed on 29 December 2005, the Examiner appears to maintain Examiner's purported Official Notice over the "sifting function" and the "non-printable ASCII characters", recited in amended independent claim 32. (22 March 2006 Office Action, Page 2). Specifically, the Examiner asserts that the "concepts or the technologies of 'sifting function' and the 'non-printable ASCII characters' are well known in the art, thus they are not invented by the applicant." (22 March 2006 Office Action, Page 2). The Applicant respectfully disagrees and respectfully requests clarification as to the subject matter for which Official Notice is being taken. The Applicant respectfully traverses the Official Notice because the asserted facts, as best understood by the Applicant, are not supported by substantial documentary evidence or any type of documentary evidence and appear to be the Examiner's opinions formulated using the subject Application as a template, which constitutes impermissible use of hindsight. Furthermore, under these circumstances, it is inappropriate for the Examiner to take Official Notice without documentary evidence to support the Examiner's conclusion. (See MPEP § 2144.03).

***The Applicant respectfully requests the Examiner to produce authority for the Examiner's Official Notice.***

Only "in limited circumstances," is it "appropriate for an examiner to take official notice of facts not in the record or to rely on common knowledge in making a rejection". (MPEP § 2144.03). "Official notice unsupported by documentary evidence **should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known.** With respect to the subject Application, **the Examiner's statement** that the "concepts or the technologies of 'sifting function' and the 'non-printable ASCII characters' are well known in the art, thus they are not invented by the applicant", **is not capable of instant and unquestionable demonstration as being well-known.** (22 March 2006 Office Action, Page 2). As noted by the court in *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the

record which may be taken by the examiner must be '*capable of such instant and unquestionable demonstration as to defy the dispute*' (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 U.S.P.Q. 6 (C.C.P.A. 1961))." (MPEP § 2144.03(A)). (Emphasis Added).

**"It is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based.** *Zurko*, 258 F.3d at 1385, 59 USPQ2d at 1697. (Emphasis Added). As the court held in *Zurko*, an assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support. *Id.* at 1385, 59 USPQ2d at 1697. See also *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002)." (MPEP § 2144.03(A)). "Ordinarily, there must be some form of evidence in the record to support an assertion of common knowledge. See *Lee*, 277 F.3d at 1344-45, 61 USPQ2d at 1434-35 (Fed. Cir. 2002); *Zurko*, 258 F.3d at 1386, 59 USPQ2d at 1697 (holding that *general conclusions concerning what is "basic knowledge" or "common sense" to one of ordinary skill in the art without specific factual findings and some concrete evidence in the record to support these findings will not support an obviousness rejection*). The examiner must provide specific factual findings predicated on sound technical and scientific reasoning to support his or her conclusion of common knowledge. See *Soli*, 317 F.2d at 946, 37 USPQ at 801; *Chevenard*, 139 F.2d at 713, 60 USPQ at 241. The applicant should be presented with the explicit basis on which the examiner regards the matter as subject to official notice and be allowed to challenge the assertion in the next reply after the Office action in which the common knowledge statement was made." (MPEP § 2144.03(B)). (Emphasis Added).

With respect to the subject Application, ***the Examiner has not properly Officially Noticed or not properly based the Official Notice on common knowledge.*** The Examiner's conclusory statement:

The concepts or the technologies of "sifting function" and the "non-printable ASCII characters" ***are well known in the art, thus they are not invented by the applicant.*** (22 March 2006 Office Action, Page 2). (Emphasis Added)

The above noticed Examiner's conclusory statement ***does not adequately address the issue that this statement is considered to be common knowledge or well-known in the art.*** The Applicants respectfully submit the following statement, to further explain why the Examiner's above noticed statement is not considered to be common knowledge or well-known in the art.

***First***, it is not clear what the Examiner means by the "concepts or the technologies of "sifting function" and the "non-printable ASCII characters" ***are well known in the art*** (i.e. what "concepts" or what "technologies" is the Examiner referring to and to what extent does the Examiner purport these "concepts" and "technologies" apply to the subject Application). In fact, the limitations recited in amended independent claim 32 are directed to "***a sifting function for creating the particular watermark pattern in the data*** for identifying the data and the source of the data, without adversely affecting the use of the data, ***the sifting function alters printable American Standard Code for Information Interchange (ASCII) characters in the data***, wherein the particular watermark pattern comprises a plurality of non-printable characters ***inserted throughout the data according to a pre-defined arrangement***, and the particular watermark pattern facilitates identification of a copy of the data and ***does not affect authorized use of the data by the one or more buyer computers***". It is not clear how the Examiner's purported "concepts" or "technologies" relates to "***creating the particular watermark pattern in the data*** for identifying the data and the source of the data, without adversely affecting the use of the data" or how it relates to "***alter[ing] printable American Standard Code for Information Interchange (ASCII) characters in the data***" or even inserting "a plurality of non-printable characters [...] ***throughout the data according to a pre-defined arrangement***".

***Second***, it is not clear what the Examiner means by "***thus they are not invented by the applicant***" (i.e. what does the Examiner mean by "***thus they are not invented by the applicant***"). It appears that the Examiner is merely presupposing what the Examiner concludes (i.e. ***they are not invented by the applicant*** because they ***are well known in the art***). This type of circular logic is impermissible under 35 U.S.C. § 103(a).

**Third**, as explained above, the Examiner's statement that the "sifting function" and the "non-printable ASCII characters", as recited in amended independent claim 32 is not considered to be common knowledge or well-known in the art. The Applicant respectfully submits that the "**sifting function**" recited in amended independent claim 32 provides for "**creating the particular watermark pattern in the data** for identifying the data and the source of the data, without adversely affecting the use of the data" and the "**sifting function**" also "**alters printable American Standard Code for Information Interchange (ASCII) characters in the data**". In addition, "the particular watermark pattern comprises a plurality of non-printable characters **inserted throughout the data according to a pre-defined arrangement**, and the particular watermark pattern facilitates identification of a copy of the data and **does not affect authorized use of the data by the one or more buyer computers**". Thus, the Applicant respectfully submits that the equations forming the foundation of the Examiner's comparison between the Examiner's purported Official Notice and amended independent claim 32 cannot be made.

**Fourth**, there is simply no disclosure, teaching, or suggestion in *Downs*, *Ogilvie*, *Kuo*, or the Examiner's purported Official Notice of a "**sifting function**" for "**creating the particular watermark pattern in the data** for identifying the data and the source of the data, without adversely affecting the use of the data, **the sifting function alters printable American Standard Code for Information Interchange (ASCII) characters in the data**, wherein the particular watermark pattern comprises a plurality of non-printable characters **inserted throughout the data according to a pre-defined arrangement**, and the particular watermark pattern facilitates identification of a copy of the data and **does not affect authorized use of the data by the one or more buyer computers**".

The Applicant respectfully submits that the Office Action provides no documentary evidence to support the purported Official Notice taken by the Examiner, yet the asserted facts are not capable of "instant and unquestionable" demonstration as being well-known. The Applicant further submits that the Applicant has adequately traversed the Examiner's assertion of purported Official Notice and directs the Examiner's attention to the pertinent text of the MPEP, which states:

If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained. See 37 CFR 1.104(c)(2). See also *Zurko*, 258 F.3d at 1386, 59 USPQ2d at 1697 ("[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test). If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. See 37 CFR 1.104(d)(2). (MPEP § 2144.03(C)).

Thus, if the Examiner continues to maintain the rejection of claims 2-4, 7, 8, 12-14, 17, 18, 22-24, 27, 28, and 31-34 based on the Examiner's purported Official Notice, the Applicant respectfully requests that the Examiner provide documentary evidence as necessitated by MPEP § 2144.03(C). Furthermore, if the Examiner is relying on personal knowledge to support the finding of what is known in the art, the Applicant further requests that the Examiner provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding as further necessitated by MPEP § 2144.03(C).

**The Proposed *Downs-Ogilvie* Combination Fails to Disclose, Teach, or Suggest Various Limitations Recited in Applicant's Dependent Claims 8, 18, and 28**

The Applicant respectfully submits that the Office Action acknowledges, and Applicant agrees, that *Downs* fails to disclose the emphasized limitations in dependent claims 8, 18, and 28. Specifically the Examiner acknowledges that *Downs* fails to teach "the pattern including a plurality of insertion, deletion, or modifications of printable ASCII characters in data according to a predefined arrangement." (22 March 2006 Office Action, Page 6). However, the Examiner asserts that the cited portions of *Ogilvie* disclose the acknowledged shortcomings in *Downs*. The Applicant respectfully traverses the Examiner's assertions regarding the subject matter disclosed in *Ogilvie*.

For example, with respect to dependent claim 8, this claim recites:

The system of Claim 32, wherein ***the pattern comprises a plurality of insertion, deletions, or modifications of printable American Standard Code for Information Interchange (ASCII) characters in the data according to a pre-defined arrangement.*** (Emphasis Added).

Dependent claims 18 and 28 recite similar limitations. *Downs* or *Ogilvie* either individually or in combination, fail to disclose, teach, or suggest each and every element of dependent claims 8, 18, and 28.

The Applicant respectfully submits that *Ogilvie* has nothing to do with dependent claim 8 limitations regarding a particular watermark pattern in data associated with one or more products comprising “***a plurality of insertion, deletion, or modifications of printable ASCII characters in data according to a pre-defined arrangement.***” Rather *Ogilvie* discloses a technique for facilitating transactions involving digital goods through a broker. (Abstract). *Ogilvie* merely discloses a sampling technique based on content types which may include ASCII text. (Column 20, Lines 8-23). However, the sampling techniques performed by the system in *Ogilvie* are performed only on digital goods. *Ogilvie* does not disclose, suggest, or even hint at ***a particular watermark pattern in data associated with one or more products according to a predefined arrangement.*** Thus *Ogilvie* cannot provide a system, method, or even software for watermarking data with one or more products comprising one or more software components collectively operable to generate an algorithm for creating ***a particular watermark pattern in data associated with one or more products*** available from one or more sellers that is a sifting function or ***a pattern in data associated with one or more products*** comprising “a plurality of insertion, deletion, or modifications of printable ASCII characters in data according to a predefined arrangement.”

The Applicant further submits that the Office Action has failed to properly establish a *prima facie* case of obviousness based on the proposed combination of *Downs* and *Ogilvie*, either individually or in combination. The Office Action has not shown the required teaching, suggestion, or motivation in these references or in

knowledge generally available to those of ordinary skill in the art at the time of the invention to combine *Downs* and *Ogilvie* as proposed. The Office Action merely states that “it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow the pattern in *Downs*’ teaching to include a plurality of insertion, deletion, or modifications of printable ASCII characters in data according to a predefined arrangement”. (22 March 2006 Office Action, Page 6). The Applicant respectfully disagrees.

The Applicant further submits that this purported advantage relied on by the Examiner is nowhere disclosed, taught, or suggested in *Downs* or *Ogilvie*, either individually or in combination. The Examiner appears to be asserting that one of ordinary skill in the art at the time the invention was made would have been motivated “for better [sic] protecting the products from unauthorized access.” (22 March 2006 Office Action, Page 6). The Applicant respectfully disagrees. ***The Applicant respectfully requests the Examiner to point to the portions of Downs or Ogilvie which contain the teaching, suggestion, or motivation to combine Downs or Ogilvie for the Examiner’s stated purported advantage.*** The Applicant further submits that the Examiner is using the subject Application as a template to formulate reconstructive hindsight, which constitutes impermissible use of hindsight under 35 U.S.C. § 103(a).

A recent Federal Circuit case makes it crystal clear that, in an obviousness situation, the ***prior art must disclose each and every element of the claimed invention, and that any motivation to combine or modify the prior art must be based upon a suggestion in the prior art.*** *In re Lee*, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). (Emphasis Added). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *Id.* at 1434-35. With respect to the subject Application, the Examiner has not adequately supported the selection and combination of *Downs* and *Ogilvie* to render obvious the Applicant’s claimed invention. The Examiner’s conclusory statements that “it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow the pattern in *Downs*’ teaching to include a plurality of insertion, deletion, or modifications of printable ASCII characters in data according to a predefined arrangement” or that “for better [sic] protecting the products

from unauthorized access", does not adequately address the issue of motivation to combine. (22 March 2006 Office Action, Page 6). This **factual question of motivation is material to patentability, and cannot be resolved on subjective belief and unknown authority.** *Id.* (Emphasis Added). It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to "[use] that which the inventor taught against its teacher." *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983). Thus, the Office Action fails to provide proper motivation for combining the teachings of *Downs* or *Ogilvie*, either individually or in combination.

**The Proposed *Downs-Ogilvie-Kuo-Berkland* Combination Fails to Disclose, Teach, or Suggest Various Limitations Recited in Applicant's Dependent Claims 9, 19, and 29**

The Applicant respectfully submits that the Office Action acknowledges, and Applicant agrees, that *Downs*, *Ogilvie*, and *Kuo* fail to disclose the emphasized limitations in dependent claims 9, 19 and 29. Specifically the Examiner acknowledges that *Downs*, *Ogilvie*, and *Kuo* fail to teach "the pattern comprises each instance of a particular group of characters in the data being underscored throughout the data." (22 March 2006 Office Action, Page 7). However, the Examiner asserts that the cited portions of *Berkland* disclose the acknowledged shortcomings in *Downs*, *Ogilvie*, and *Kuo*. The Applicant respectfully traverses the Examiner's assertions regarding the subject matter disclosed in *Berkland*.

For example, with respect to dependent claim 9, this claim recites:

The system of Claim 32, wherein ***the pattern comprises each instance of a particular group of characters in the data being underscored throughout the data.*** (Emphasis Added).

Dependent claims 19 and 29 recite similar limitations. *Downs*, *Ogilvie*, *Kuo*, or *Berkland*, either individually or in combination, fail to disclose, teach, or suggest each and every element of dependent claims 9, 19, and 29.

The Applicant further submits that *Berkland* has nothing to do with dependent claim 9 limitations regarding a particular watermark pattern in data associated with one or more products comprising “**each instance of a particular group of characters** in the data **being underscored** throughout the data.” Rather *Berkland* discloses a printer function that allows underscored text to be printed. (Column 10, Lines 12-30). The Applicant respectfully submits that *Berkland* does not disclose, teach, or even hint at **each instance of a particular group of characters in the data being underscored**. It appears that the Examiner is somehow equating “**each instance of a particular group of characters in the data being underscored**” recited in dependent claim 9 with the printer function, in *Berkland*, that allows underscored text to be printed. (22 March 2006 Office Action, Page 7). However, the underscored text in *Berkland*, may be accomplished by either a word processor underscoring a text data stream (and sending it to a printer) or by sending data to a printer, where the printing of a line including underscored text takes two printing passes without an intervening line feed, albeit a slow printing process. (Column 10, Lines 12-30). In contrast, the algorithm recited in dependent claim 9 is generated for creating a particular pattern and is applied to “**each instance of a particular group of characters in the data being underscored**.” Thus, *Berkland* cannot provide a particular pattern in data comprising “**each instance of a particular group of characters** in the data **being underscored** throughout the data”, since, *Berkland* does not even provide for the ability to underscore a particular group of characters in the first place. In addition, the Applicant respectfully submits that the equations forming the foundation of the Examiner’s comparison between *Berkland* and dependent claim 9 cannot be made. The Applicant further respectfully submits that these distinctions alone are sufficient to patentably distinguish dependent claim 9 from *Berkland*.

The Applicant further submits that the Office Action has failed to properly establish a *prima facie* case of obviousness based on the proposed combination of *Downs*, *Ogilvie*, *Kuo*, and *Berkland*, either individually or in combination. The Office Action has not shown the required teaching, suggestion, or motivation in these references or in knowledge generally available to those of ordinary skill in the art at the time of the invention to combine *Downs*, *Ogilvie*, *Kuo*, and *Berkland* as proposed. The

Office Action merely states that "it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow the particular group of characters in the teaching of *Downs* modified by *Ogilvie* to be underscored throughout the data". (22 March 2006 Office Action, Page 7). The Applicant respectfully disagrees.

The Applicant further submits that this purported advantage relied on by the Examiner is nowhere disclosed, taught, or suggested in *Downs*, *Ogilvie*, *Kuo*, or *Berkland*, either individually or in combination. The Examiner appears to be asserting that one of ordinary skill in the art at the time the invention was made would have been motivated "because this would provide sellers more choices with additional various patterns that can be added to the data so that the sellers' products can be better [sic] protected." (22 March 2006 Office Action, Page 7). The Applicant respectfully disagrees. ***The Applicant respectfully requests the Examiner to point to the portions of Downs, Ogilvie, Kuo, or Berkland which contain the teaching, suggestion, or motivation to combine Downs, Ogilvie, Kuo, or Berkland for the Examiner's stated purported advantage.*** The Applicant further submits that the Examiner is using the subject Application as a template to formulate reconstructive hindsight, which constitutes impermissible use of hindsight under 35 U.S.C. § 103(a).

A recent Federal Circuit case makes it crystal clear that, in an obviousness situation, the ***prior art must disclose each and every element of the claimed invention, and that any motivation to combine or modify the prior art must be based upon a suggestion in the prior art.*** *In re Lee*, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). (Emphasis Added). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *Id.* at 1434-35. With respect to the subject Application, the Examiner has not adequately supported the selection and combination of *Downs*, *Ogilvie*, *Kuo*, and *Berkland* to render obvious the Applicant's claimed invention. The Examiner's conclusory statements that "it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow the particular group of characters in the teaching of *Downs* modified by *Ogilvie* to be underscored throughout the data" or that "because this would provide sellers more choices with additional various patterns that can be added to the data so that the sellers' products

can be better [sic] protected", **does not adequately address the issue of motivation to combine**. (22 March 2006 Office Action, Page 7). This **factual question of motivation is material to patentability, and cannot be resolved on subjective belief** and unknown authority. *Id.* (Emphasis Added). It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to "[use] that which the inventor taught against its teacher." *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983). Thus, the Office Action fails to provide proper motivation for combining the teachings of *Downs*, *Ogilvie*, or *Berkland*, either individually or in combination.

**The Proposed *Downs-Ogilvie-Kuo-Astola* Combination Fails to Disclose, Teach, or Suggest Various Limitations Recited in Applicant's Dependent Claims 10, 20, and 30**

The Applicant respectfully submits that the Office Action acknowledges, and Applicant agrees, that *Downs*, *Ogilvie*, and *Kuo* fail to disclose the emphasized limitations in dependent claims 10, 20, and 30. Specifically the Examiner acknowledges that *Downs*, *Ogilvie*, and *Kuo* fail to teach "determining a first sum of numerical values of bytes representing the data stored in the one or more databases for later comparison with a second sum of numerical values of bytes representing data from another source to determine whether the data from the other source is a copy of the data from the one or more databases." (22 March 2006 Office Action, Pages 7-8). However, the Examiner asserts that the cited portions of *Astola* disclose the acknowledged shortcomings in *Downs*, *Ogilvie*, and *Kuo*. The Applicant respectfully traverses the Examiner's assertions regarding the subject matter disclosed in *Astola*.

For example, with respect to dependent claim 9, this claim recites:

The system of Claim 32, wherein **the software components** are collectively further operable to **determine a first sum of numerical values of bytes representing the data stored in the one or more databases for later comparison with a second sum of numerical values of bytes representing data from another source to determine whether the data from the other source is a copy of the data from the one or more databases**. (Emphasis Added).

Dependent claims 20 and 30 recite similar limitations. *Downs* or *Astola*, either individually or in combination, fail to disclose, teach, or suggest each and every element of dependent claims 10, 20, and 30.

The Applicant further submits that *Astola* has nothing to do with dependent claim 10 limitations regarding software components operable to determine “a first sum of numerical values of bytes representing the data stored in the one or more databases for later comparison with a second sum of numerical values of bytes representing data from another source to determine whether the data from the other source is a copy of the data from the one or more databases.” Rather *Astola* describes a checksum method associated with image files. (Column 1, Lines 45-54). In fact, the image disclosed in *Astola* is a two-dimensional still image produced by a photographic apparatus. (Column 1, Lines 5-15). In contrast, the algorithm recited in dependent claim 10 is generated for **“creating a particular pattern in data associated with one or more products available from one or more sellers and comprising one or more product attribute values, seller attribute values, and product descriptions for each of the one or more products.”** The checksum method in *Astola*, associated with still images, has nothing to do with the limitations in dependent claim 10. *Astola* does not disclose, suggest, or even hint at **“an algorithm generated for creating a particular pattern in data associated with one or more products”** and operable to “determine a first sum of numerical values of bytes representing the data stored in the one or more databases for later comparison with a second sum of numerical values of bytes representing data from another source to determine whether the data from the other source is a copy of the data from the one or more databases.” Thus, *Astola* cannot “determine a first sum of numerical values of bytes representing the data stored in the one or more databases for later comparison with a second sum of numerical values of bytes representing data from another source to determine whether the data from the other source is a copy of the data from the one or more databases”, since, *Astola* only discloses a two-dimensional still image produced by a photographic apparatus.

The Applicant further submits that the Office Action has failed to properly establish a *prima facie* case of obviousness based on the proposed combination of

*Downs, Ogilvie, Kuo, and Astola*, either individually or in combination. The Office Action has not shown the required teaching, suggestion, or motivation in these references or in knowledge generally available to those of ordinary skill in the art at the time of the invention to combine *Downs, Ogilvie, Kuo, and Astola* as proposed. The Office Action merely states that “it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow *Downs*’ teaching to include the feature of whether a data is original by comparing the sum of numerical byte values of the data with the checksum of the original data.” (4 October 2005 Final Office Action, Page 8). The Applicant respectfully disagrees.

The Applicant further submits that this purported advantage relied on by the Examiner is nowhere disclosed, taught, or suggested in *Downs, Ogilvie, Kuo, or Astola*, either individually or in combination. The Examiner appears to be asserting that one of ordinary skill in the art at the time the invention was made would have been motivated “for quickly determining the source of the data.” (4 October 2005 Final Office Action, Page 8). The Applicant respectfully disagrees. ***The Applicant respectfully requests the Examiner to point to the portions of Downs, Ogilvie, Kuo, or Astola which contain the teaching, suggestion, or motivation to combine Downs, Ogilvie, Kuo, or Astola for the Examiner’s stated purported advantage.*** The Applicant further submits that the Examiner is using the subject Application as a template to formulate reconstructive hindsight, which constitutes impermissible use of hindsight under 35 U.S.C. § 103(a).

A recent Federal Circuit case makes it crystal clear that, in an obviousness situation, the ***prior art must disclose each and every element of the claimed invention, and that any motivation to combine or modify the prior art must be based upon a suggestion in the prior art.*** *In re Lee*, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). (Emphasis Added). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *Id.* at 1434-35. With respect to the subject Application, the Examiner has not adequately supported the selection and combination of *Downs, Ogilvie, Kuo, and Astola* to render obvious the Applicant’s claimed invention. The Examiner’s conclusory statements that “it would have been obvious to one of ordinary skill in the art at the time the invention was made to allow *Downs*’ teaching to

include the feature of whether a data is original by comparing the sum of numerical byte values of the data with the checksum of the original data" or "for quickly determining the source of the data", does not adequately address the issue of motivation to combine. (4 October 2005 Final Office Action, Page 8). This ***factual question of motivation is material to patentability, and cannot be resolved on subjective belief*** and unknown authority. *Id.* (Emphasis Added). It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to "[use] that which the inventor taught against its teacher." *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983). Thus, the Office Action fails to provide proper motivation for combining the teachings of *Downs*, *Ogilvie*, *Kuo*, or *Astola*, either individually or in combination.

**The Applicant's Claims are Patentable over the Proposed *Downs-Ogilvie-Kuo-Berkland-Astola* Combination**

With respect to amended independent claims 31, 33, and 34 each of these claims includes limitations similar to those discussed above in connection with amended independent claim 32. Thus, amended independent claims 31, 33, and 34 are considered patentably distinguishable over the proposed combination of *Downs*, *Ogilvie*, *Kuo*, *Berkland*, and *Astola* for at least the reasons discussed above in connection with amended independent claim 32.

With respect to dependent claims 2-4, 7-10, 12-14, 17-20, 22-24, and 27-30: claims 2-4 and 7-10 depend from amended independent claim 32; claims 12-14 and 17-20 depend from independent claim 33; and claims 22-24 and 27-30 depend from independent claim 34. As mentioned above, each of amended independent claims 33 and 34 includes limitations similar to those discussed above in connection with amended independent claim 32. Thus, amended independent claims 33 and 34 are considered patentably distinguishable over *Downs*, *Ogilvie*, *Kuo*, *Berkland*, and *Astola* for at least the reasons discussed above in connection with amended independent claim 32. Thus, dependent claims 2-4, 7-10, 12-14, 17-20, 22-24, and 27-30 are considered patentably distinguishable over the proposed combination of *Downs*, *Ogilvie*, *Kuo*, *Berkland*, and

*Astola* for at least the reasons of depending from an allowable claim and are therefore considered to be in condition for allowance.

For at least the reasons set forth herein, the Applicant submits that claims 2-4, 7-10, 12-14, 17-20, 22-24, and 31-34 are not rendered obvious by the proposed combination of *Downs*, *Ogilvie*, *Kuo*, *Berkland*, and *Astola*. The Applicant further submits that claims 2-4, 7-10, 12-14, 17-20, 22-24, and 31-34 are not rendered obvious by the proposed combination of *Downs*, *Ogilvie*, *Kuo*, *Berkland*, and *Astola* and are in condition for allowance. Thus, the Applicant respectfully requests that the rejection of claims 2-4, 7-10, 12-14, 17-20, 22-24, and 31-34 under 35 U.S.C. § 103(a) be reconsidered and that claims 2-4, 7-10, 12-14, 17-20, 22-24, and 31-34 be allowed.

#### **THE LEGAL STANDARD FOR OBVIOUSNESS REJECTIONS UNDER 35 U.S.C. § 103:**

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there ***must be some suggestion or motivation***, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) ***must teach or suggest all the claim limitations***. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and ***not based on applicant's disclosure***. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991); M.P.E.P. § 2142. Moreover, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974). If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988); M.P.E.P. § 2143.03.

With respect to alleged obviousness, there must be something in the prior art as a whole to ***suggest*** the desirability, and thus the obviousness, of making the combination. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561 (Fed. Cir. 1986). In fact, the absence of a suggestion to combine is dispositive in an obviousness determination. *Gambro*

*Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573 (Fed. Cir. 1997). The mere fact that the prior art can be combined or modified does not make the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 U.S.P.Q.2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01. The consistent criterion for determining obviousness is whether the prior art would have suggested to one of ordinary skill in the art that the process should be carried out and would have a reasonable likelihood of success, viewed in the light of the prior art. Both the suggestion and the expectation of success must be founded in the prior art, not in the Applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991); *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988); M.P.E.P. § 2142.

A recent Federal Circuit case makes it clear that, in an obviousness situation, the prior art must disclose each and every element of the claimed invention, and that any motivation to combine or modify the prior art must be based upon a suggestion in the prior art. *In re Lee*, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *Id.* at 1434-35.

**CONCLUSION:**

In view of the foregoing amendments and remarks, this application is considered to be in condition for allowance, and early reconsideration and a Notice of Allowance are earnestly solicited.

Although the Applicant believes no fees are deemed to be necessary; the undersigned hereby authorizes the Commissioner to charge any additional fees which may be required, or credit any overpayments, to **Deposit Account No. 500777**.

**Please link this application to Customer No. 53184 so that its status may be checked via the PAIR System.**

Respectfully submitted,

5/16/06

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